75

5

FILED
NOV 21 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-539

IN THE

Supreme Court of the United States

PROGRESS ENERGY, INC.,

Petitioner,

v.

BARBARA TAYLOR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND THE COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES IN SUPPORT OF PETITIONER

MICHAEL F. SMITH
Counsel of Record
MIRIAM L. ROSEN
Butzel Long
1747 Pennsylvania Ave. N.W.
Suite 300
Washington, DC 20006
(202) 454-2888

November 21, 2007

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

REASONS FOR GRANTING THE WRIT 4

I. The Conflict Among the Circuits On this Issue Creates Significant Uncertainty for Employers and Their Human Resource Staffs 4

A. Uncertainty In the Area of FMLA Releases Will Increase the Already Significant Burdens the Act Places Upon Employers ... 5

B. Allowing the Circuit Conflict to Linger Could Result in Decreased Use of Employment Releases and Waivers, With Resulting Increases In Litigation and Costs Imposed On Employers and Employees Alike 13

CONCLUSION 16

TABLE OF AUTHORITES

Cases

Faris v. Williams WPC-I, Inc.,
332 F.3d 316 (5th Cir. 2003) 11, 14-15

Federal Labor Relations Auth. v.
Aberdeen Proving Grounds, 485 U.S. 409 (1988) . 12

Mitchell v. H.B. Zachry Co.,
362 U.S. 310 (1960) 12

Ragsdale v. Wolverine World Wide, Inc.,
535 U.S. 81 (2002) 4

Thompson v. Keohane,
516 U.S. 99 (1995) 12

Statutes

Age Discrimination in Employment Act 15

Family and Medical Leave Act of 1993

29 U.S.C. § 2601 *et seq.* ..... *passim*

29 U.S.C. § 2601(b)(1) 4

29 U.S.C. § 2611(4)(A)(ii)(I) 3

Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978

5 U.S.C. § 7101 *et seq.* 12

28 U.S.C. § 2254(d) 12

Regulations

29 C.F.R. § 825.104(d) 3

29 C.F.R. § 825.220(d) 2, 3

Legislative

H.R. Rep. No. 102-135, pt. 1 (1991) 4

S. Rep. No. 103-3 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3 5

Other

2006 CCH Unscheduled Absence Survey, *available at* www.cch.com/press/news/2006/20061026h.asp 9

Comments and Response to the U.S. Department of Labor's Request for Information on the Family and Medical Leave Act (The National Coalition to Protect Family Leave), Feb. 16, 2007, *available at* http://www.protectfamilyleave.org/pdf/coalition_fmla_comments.pdf 10

FMLA and Its Impact on Organizations (SHRM, Alexandria, Va.), July 2007 7-10

David K. Haase & Emma Sullivan, *The Pitfalls of Releases*, National Law Journal, Oct. 23, 2006, *available at* http://www.jenner.com/files/tbl_s20 Publications%5CRelatedDocuments PDFs1252%5C1449%5CNLJHaase_Sullivan _Article.pdf. 5, 10

Keith N. Hylton, *Agreements to Waive or Arbitrate Legal Claims: An Economic Analysis*, 8 Sup. Ct. Econ. Review 209 (2000). 15

Frank A. Tola and Christopher K. Ramsey, *What Is An Employer To Do? Employment Termination, Severance and Waivers*, set forth in *Layoffs and Job Security Survey* (SHRM, Alexandria, Va.) 2001, *available at* http://www.shrm.org.hrresources/white papers_published/CMS_000139.asp 13

U.S. Department of Labor, Bureau of Labor Statisics, *News: Mass Layoffs In September 2007* (Oct. 23, 2007), *available at* http://www.bls.gov/ news.release/ archives/mmls_10232007.pdf 14

U.S. Department of Labor, *Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information; Proposed Rule*, 72 Fed. Reg. 35550 (June 28, 2007) 6, 9, 15

Carol Wong, Note, *The Family and Medical Leave Act: To Waive, Or Not to Waive*, 2007 U. Ill. L. Rev. 1567 ..... 5-6, 13-14

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae Society for Human Resource Management (SHRM) and the College and University Professional Association for Human Resources (CUPA-HR) are the Nation's preeminent organizations representing human resource professionals in the private and public sector and with institutions of higher learning, respectively.

Amicus SHRM is the world's largest association devoted to human resource (HR) management. SHRM represents more than 225,000 individual members in more than 550 affiliated chapters across the United States, as well as in more than 125 other countries. Founded in 1948, SHRM's mission is to serve its members' needs by providing them the most essential and comprehensive HR resources available, and to advance the HR profession to ensure that it is recognized as an essential partner in developing and executing organizational strategy.

Amicus CUPA-HR serves as the voice of human resources in higher education, representing nearly 10,000 HR professionals at 1,600 colleges and universities across the country, including 85 percent of

---

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief, and the parties consented to its filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

all U.S. doctoral institutions, 75 percent of all master's institutions, more than half of all bachelor's institutions and 465 community colleges. Higher education employs 3.3 million workers nationwide, in every State in the country.

Both *amici* count among their members HR professionals in all 50 States. Many administer human resource issues for employers covered by the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et. seq* (FMLA), administering leave policies under the Act and its regulations and making sure their employers are in compliance. As representatives of employers who are potential defendants in FMLA and other employment-related litigation – and as potential defendants themselves – the members of *amici* are keenly interested in preserving effective, voluntary means of resolving such claims without the costs, risks and other burdens associated with litigation.

These members and their employers now are presented with a dilemma as to how to obtain effective releases of FMLA claims. Under practices that date to the FMLA's enactment in 1993, most if not all have been obtaining FMLA releases as part of routine general contractual release agreements entered into with departing employees, without any intervention by, or involvement of, the Department of Labor or the Federal courts. Under the Fourth Circuit's ruling that 29 C.F.R. 825.220(d) precludes the private settlement or release of FMLA claims, however, that practice is now called into serious question nationwide.

Additionally, some of the members of *amicus* SHRM are HR professionals whose employers have operations in *both* the Fourth and Fifth circuits. For those HR professionals, their company's operations in the five States of the Fourth Circuit now cannot invoke an FMLA release obtained in a private agreement to forestall or defeat an FMLA lawsuit, while the same company in the States of the Fifth Circuit (and elsewhere) may continue to obtain such releases, albeit at peril of having them later ruled invalid. This is the antithesis of nationwide uniformity that the FMLA was designed to foster.

Lastly, many members of *amici* have a direct personal interest in the issue presented in the Petition, since the FMLA imposes individual liability upon private-sector supervisors for violating an employee's FMLA rights. 29 U.S.C. § 2611(4)(A)(ii)(I); 29 C.F.R. 825.104(d).

The members of *amici* SHRM and CUPA-HR have a strong and direct interest in seeing the circuit conflict on this issue resolved now, not at some uncertain future point.

SUMMARY OF ARGUMENT

Employers make extensive use of general releases as part of the employment separation process, yet the Fourth Circuit's unprecedented holding – interpreting 29 C.F.R. § 825.220(d) to bar employees from ever waiving an FMLA claim without supervision by the DOL or a court – casts tremendous uncertainty over their continued ability to do so. It makes it virtually impossible for employers to obtain an enforceable

general release that includes FMLA claims with any degree of confidence, absent litigation or DOL involvement, and introduces great uncertainty into HR practices nationwide.

Given the significant burdens already imposed on employers by the FMLA, and the importance that HR professionals, employers and employees place on private general releases, the Court should grant the Petition and remove this uncertainty by resolving the conflict among the circuits.

REASONS FOR GRANTING THE WRIT

I. The Conflict Among the Circuits On this Issue Creates Significant Uncertainty for Employers and Their Human Resource Staffs.

The FMLA was enacted in 1993 with the laudable goal of allowing workers to balance family and work obligations in a manner that would not prove unduly burdensome to employers. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002), *citing* H.R. Rep. No. 102-135, pt. 1, p. 37 (1991). Congress expressly included among its findings and purposes, its desire "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote *national* interests in preserving family integrity." 29 U.S.C. § 2601(b)(1) (emphasis added).

Congress deemed the imposition of a uniform nationwide leave obligation to be critical, because it permitted employers to provide benefits for employees without putting any at a competitive disadvantage.

"Uniform standards like the FMLA help all businesses maintain a minimum floor of protection for their employees without jeopardizing or decreasing their competitiveness." S. Rep. No. 103-3, p. 18 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 20. Thus, it is clear that Congress intended not only to strike a balance between employer and employee rights, but also to do so in a nationally uniform manner.

The conflict between the circuits on the validity of private releases undermines that goal of national uniformity of FMLA obligations, and casts great uncertainty upon this aspect of employer-employee relations.

A. Uncertainty In the Area of FMLA Releases Will Increase the Already Significant Burdens the Act Places Upon Employers.

To reduce the risks and costs of potential litigation, employers frequently enter into severance agreements with departing employees that include a general release of claims. Such agreements typically offer severance benefits to employees in exchange for a release of "any and all" claims. Carol Wong, Note, *The Family and Medical Leave Act: To Waive, Or Not to Waive*, 2007 U. Ill. L. Rev. 1567, 1579, *citing* David K. Haase & Emma Sullivan, *The Pitfalls of Releases*, National Law Journal, October 23, 2006, p. 16, *available at* http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C1449%5CNLJHaase_Sullivan_Article.pdf. But the Fourth Circuit's ruling and resulting conflict among the circuits has introduced a high degree of uncertainty into this area, throwing employment-law practitioners

"into a state of confusion about what to advise their clients," Wong, *Id.* at 1580 – many of whom are HR professionals and members of *amici*.

The FMLA is far-reaching in scope, as Congress intended it to be. The Department of Labor (DOL) estimates that 94.4 million individuals worked at FMLA-covered worksites as of 2005, the most recent figures available. U.S. Department of Labor, *Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information; Proposed Rule*, 72 Fed. Reg. 35550, 35622 (June 28, 2007). Of those individuals, 76.1 million were eligible for FMLA leave. *Id.* In other words, more than half of the nation's 141.7 million-member workforce is covered by the Act and its regulations, and each of those individuals during his or her employment becomes a potential holder of one or more claims under the FMLA. By various estimates cited by the DOL, at least 2.4 million workers, and perhaps as many as 13 million workers, actually took FMLA leave in 2005. 72 Fed. Reg. at 35622. Thus, it is with good reason that employers routinely seek to obtain releases of FMLA (and other) claims upon separation from employment.

As the nation's largest human resource organization, SHRM routinely conducts comprehensive surveys of its members on issues of significant and widespread interest to them. Earlier this year it conducted one such survey regarding the FMLA, with which employers have struggled since its enactment in 1993 – especially those provisions dealing with unscheduled leave for episodic or chronic serious health conditions, the definition of a "serious health condition" and the implications of intermittent leave.

FMLA and Its Impact on Organizations (SHRM, Alexandria, Va.), July 2007 (hereafter, "Survey Report"). The 2007 survey included responses from a randomly selected pool of 521 HR professionals, with a margin of error of plus or minus 4 points. SHRM's membership are especially well-suited to provide valuable insights and data on the topic: HR professionals are likely to be the person within their organization charged with implementing FMLA policies and procedures, and thus are typically the individual most knowledgeable regarding the Act's real-world impact on the organization. *Id*, p. 1.

Among the findings of the 2007 survey:

- The "vast majority" of HR professionals agree that there have been more requests for FMLA leave in the past five years, as compared to 10 years ago, across a variety of situations. *Id.*, p. 7. Types of leave with the greatest increases were those resulting from an employee's episodic condition (81 percent of respondents "strongly" or "somewhat" agree that such requests have increased in their organization the past five years), maternity, birth or adoption of a child (73 percent) and care for a parent with a serious health condition (72 percent). Survey Report, pp. 13-14.

- Overall, 95 percent of HR professionals reported at least one instance of FMLA leave in his or her organization in the preceding 12 months. *Id.*, p. 14.

- Among the most difficult compliance areas are tracking/administering intermittent FMLA leave (80 percent of HR professionals rate it either "somewhat difficult" or "very difficult"); determining overall FMLA compliance costs (79 percent) and determining whether an intermittent "serious health condition" is covered by the Act (73 percent). *Id.* at 20-21. Significantly, *63 percent of HR professionals rated the overall ease of complying with the FMLA "somewhat difficult" or "very difficult"* – up sharply from the 36-percent figure reported in a similar survey conducted in 2000 by Westat. *Id.* at 20-21.

- Confusion caused by "the sometimes contradictory and confusing aspects" of DOL information can cause uncertainties in administering FMLA leave policies. "In some cases, employers may perceive employee requests for FMLA leave as illegitimate but still feel the need to grant the leave, perhaps to avoid the possibility of litigation." Survey Report, p. 23.

- HR professionals in large organizations (500 or more employees) are more likely to experience challenges in administering/granting FMLA leave across most leave categories, and more likely than those in small organizations to indicate the business productivity, employee turnover and business growth were negatively

affected by the Act and its regulations. *Id.*, pp. 18-19, 29.

These results track closely with those of two SHRM polls taken in November 2006, regarding specific FMLA-related difficulties encountered by members' organizations. Survey Report, p. 18 & nn. 17, 18. Nearly three-fourths of participants (73 percent) reported challenges with tracking intermittent leave, while other widely identified problem areas included chronic abuse of intermittent leave (66 percent), morale problems among employees asked to cover for co-workers on leave (63 percent), costs associated with lost productivity due to absences (60 percent), and both vague documentation of "serious health conditions" by health-care professionals, and uncertainty about the legitimacy of leave requests for an employee's episodic condition (57 percent each). Survey Report, p. 18. Abuse of intermittent FMLA is an especially large and growing problem – entities who responded to the DOL's 2006 Request for Information regarding the FMLA noted a "menacing, intangible cost" of such abuse on co-workers who must cover shifts, and difficulties posed by those invoking such FMLA leave on or near a holiday after their request for time off has been denied. 72 Fed. Reg. at 35579-35580. Indeed, CCH's annual survey found that unscheduled absenteeism in 2006 climbed to its highest level since 1999. *Id.* at 35636, *citing* 2006 CCH Unscheduled Absence Survey, *available at* www.cch.com/press/news/2006/20061026h.asp.

In 2007 CUPA-HR also conducted a survey of members on the FMLA and found similar results. More than 85 percent of the 360 CUPA-HR members

who responded reported challenges with the definition of "serious health condition," more than 80 percent reported problems with tracking intermittent leave and close to 75 percent reported problems with notice of leave and unscheduled absences.

Thus, it is clear that HR professionals have struggled for some time, and continue to struggle, with aspects of the FMLA. Mixed signals regarding FMLA obligations do not help. SHRM's 2006 polls indicated that "some HR professionals have found the DOL regulations, guidance and opinion letters to be contradictory and confusing for various types of FMLA leave," and as a result, "it may not always be clear to employers what conditions qualify and under what circumstances they qualify as a serious health condition." Survey Report, p. 21. As one organization noted in response to the DOL's RFI regarding the FMLA regulations, "[w]ith the Act itself silent on the enforceability of waivers and the regulations containing a terse one-sentence prohibition, further guidance on the enforceability of waivers is needed." *Comments and Response to the U.S. Department of Labor's Request for Information on the Family and Medical Leave Act* (The National Coalition to Protect Family Leave), February 16, 2007, p. 38, *available at* http://www.protectfamilyleave.org/pdf/coalition_fmla_comments.pdf.

Against this backdrop, it is not surprising that employers have come to rely on the practice of including FMLA claims in the general releases they routinely obtain from employees upon separation from employment. *See generally*, Haase & Sullivan, *supra*. Such releases help employer and employee alike by

allowing them to tie up a wide variety of loose ends from the employment relationship: employees typically obtain money in exchange for giving a release, and employers gain certainty and predictability with regard to potential outstanding claims. But by adding FMLA claims to the short list of matters that cannot be waived in a general release – or more accurately, *will* not be waived, at least until the conflict between circuits is resolved – the Fourth Circuit ruling severely undermines that widespread practice.

Indeed, the conflict now created by the Fourth Circuit's ruling will translate directly into additional uncertainty for employers and members of *amici* nationwide. Already facing several chronic problem areas under the Act, and inclined to cave in and grant suspect leave requests rather than face possible litigation, employers and their HR staffs now face the added burden of not being able to "tie up the loose ends" on a departing employee's relationship with the company in a general release agreement. The already-daunting task of complying with the FMLA and its maze of regulations will be made even more so by the knowledge that any interpretive mistake, no matter how innocent, no longer may be rectified by purchasing a private FMLA release from the employee upon departure. Nor is there any consistency as to where that burden will be imposed: while employers and HR professionals in the States of the Fifth Circuit (for now) may continue to use such releases, based on the ruling in *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003), employers in the Fourth Circuit cannot – and those in the remaining 42 States simply don't know.

This Court has recognized that a conflict among the circuits in the interpretation of a workplace-related statute presents sufficient grounds for granting certiorari. *See, e.g., Mitchell v. H.B. Zachry Co.*, 362 U.S. 310, 313 (1960) (certiorari granted to resolve circuit conflict on issue of interpreting Fair Labor Standards Act). This has been the case even where the conflict is only between two circuits. *Federal Labor Relations Auth. v. Aberdeen Proving Grounds*, 485 U.S. 409, 472-473 (1988) (certiorari granted to resolve conflict between D.C. and Fourth circuits over interpretation of provision of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 *et. seq.*). Because "uniformity among federal courts is important" on significant questions, this Court may grant certiorari to end the conflict of authority. *Thompson v. Keohane*, 516 U.S. 99, 106-107 (1995) (certiorari granted to resolve circuit conflict over construction of Federal habeas corpus statute, 28 U.S.C. § 2254(d)).

The FMLA is a statute of sweeping scope, with nearly 100 million employees working at FMLA-covered workplaces, and more than 76 million of those eligible for leave. In 2005, between 2.4 million and 13 million actually took FMLA leave, and an unknown additional number requested it but were denied. The current uncertainty into which the Fourth Circuit's ruling has plunged the law governing private releases of FMLA claims provides a compelling reason for this Court to grant certiorari.

B. Allowing the Circuit Conflict to Linger Could Result in Decreased Use of Employment Releases and Waivers, With Resulting Increases In Litigation and Costs Imposed On Employers and Employees Alike.

The uncertainty caused by the conflict between the Fourth and Fifth circuits also could slow, if not bring to a standstill, voluntary separation incentives and involuntary separation severance-pay programs. Large-scale reductions-in-force (RIFs) have become one of the defining characteristics of employment in the United States since the mid-1980s, and are now a "pervasive and permanent" part of the workplace. Frank A. Tola and Christopher K. Ramsey, *What Is An Employer To Do? Employment Termination, Severance and Waivers*, set forth in *Layoffs and Job Security Survey* (SHRM, Alexandria, Va.) 2001, pp. 64, 69, *available at* www.shrm.org/hrresources/whitepapers_published/CMS_000139.asp. Given the litigious nature of our society and the risk of runaway jury verdicts in RIF cases, the practice of employers offering a severance package has become widespread – according to a 2001 SHRM survey, 80 percent of recently laid-off employees received some form of severance package. *Layoffs and Job Security Survey*, *supra*, p. 15. The linchpin of the entire severance process is the valid waiver of claims that employees give to employers. Tola and Ramsey, p. 68.

The Fourth Circuit ruling jeopardizes the ability of employers and employees to voluntarily resolve FMLA and other claims. "[E]mployers may offer to settle for less or refuse to settle at all because parties often join

FMLA claims with other claims arising under other employment discrimination laws." Wong, *Id.* at 1579-1580. In some cases, employees may be able to collect severance pay and *still* be able to bring an FMLA claim regardless of how soundly the release is drafted. Haase and Sullivan, *supra*, p. 16. Given that, employers likely will offer employees less in severance than they otherwise would – because they are receiving a release from at least one less claim.

This is not insignificant, given the prevalence of severance programs – especially in the "mass layoff" situation, which the DOL defines as layoffs of 50 or more workers. Employers in the third quarter of 2007 undertook a total of 3,279 "mass layoff events," involving a total of 336,262 employees. U.S. Department of Labor, Bureau of Labor Statisics, *News: Mass Layoffs In September 2007* (October 23, 2007), *available at* http://www.bls.gov/news.release/archives/mmls_10232007.pdf. No doubt, many of those employees were offered severance agreements that included a general release of claims. The circuit conflict thus casts a veil of uncertainty over a widespread practice that, in all likelihood, is voluntarily engaged in by hundreds of thousands of employees – and their soon-to-be former employers – each year. The uncertainty engendered by the Fourth Circuit's ruling therefore has substantial consequences both for employers and employees.

Public policy favors the private settlement of employment disputes. *Faris*, 332 F.3d at 322 ("Our reading of the regulation is bolstered by public policy favoring the enforcement of waivers and our knowledge that similar waivers are allowed in other

regulatory contexts. Waivers of the right to bring suit under the Age Discrimination in Employment Act ("ADEA") are enforced by this court and are not void as against public policy.") Private release agreements perform both a socially and economically useful role, since they typically let the parties share between themselves costs that would otherwise be consumed in litigation. Keith N. Hylton, *Agreements to Waive or Arbitrate Legal Claims: An Economic Analysis*, 8 Sup. Ct. Econ. Rev. 209, 217-221 (2000). But the conflict among the circuits and resulting uncertainty threatens to undermine private resolution, and push even amicable employer-employee separations into the DOL or the Federal courts.

The Court should not wait until "more" of a circuit conflict develops before it settles this issue, but rather should grant the Petition and resolve it now. *Amici* fully support the policy goals of the FMLA, but the statute and its regulations already impose significant compliance issues and burdens on their members' employers. According to the Office of Advocacy of the U.S. Small Business Administration, while the DOL in 1995 estimated that the cost to business of the FMLA was $675 million annually, a more comprehensive 2004 survey done by the Employment Policy Foundation estimated – based on respondents' compliance costs – that compliance with the Act in 2004 directly cost employers *$21 billion* in terms of lost productivity due to absenteeism, continued health benefits and net replacement labor costs. 72 Fed. Reg. at 35629-35630.

As long as it exists, the circuit conflict will only increase compliance difficulties and undermine the

likelihood of employers and employees entering into voluntary agreements – because employers cannot rely on the enforceability of such agreements while the circuits disagree. For the sake of employers and employees alike, the conflict in the area of FMLA releases should be resolved now.

CONCLUSION

Amici curiae Society for Human Resource Management and the College and University Professional Association for Human Resources request that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL F. SMITH
Counsel of Record
MIRIAM L. ROSEN
BUTZEL LONG
1747 Pennsylvania Ave N.W.
Suite 300
Washington, D.C. 20006
(202) 454-2888

Counsel for Amici